

## FINRA Now Authorized to Seek SARs Materials from Member Broker-Dealers

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In December, 2010, the U.S. Treasury Department's Financial Crimes Enforcement Network (FinCEN) issued a final rule (Final Rule), effective January 3, 2011, amending the Bank Secrecy Act (BSA) regulations relating to disclosure of suspicious activity reports (SARs) by financial institutions and governmental authorities.<sup>1</sup> The BSA and its implementing regulations generally require financial institutions to file a SAR with FinCEN, their primary federal regulator, or other law enforcement authorities when they detect a known or suspected violation of federal law or a suspicious activity related to money laundering, terrorist financing, or other criminal activity.<sup>2</sup> SARs are typically unproven reports of possible violations or suspicious activity used for law enforcement or regulatory purposes. Government authorities and financial institutions (and their officers, directors, employees, and agents) are prohibited from disclosing a SAR except as authorized by the implementing regulations.

Among other things, the Final Rule addresses disclosure to a financial institution's self-regulatory organization (SRO). Explicitly recognizing that a financial institution's primary federal regulator is in the best position to understand an SRO's need for BSA information and to monitor the SRO's interactions with the covered institution, the Final Rule permits SAR disclosure by a broker-dealer to an SRO that examines it for compliance with the BSA, but only if the Securities and Exchange Commission (SEC) requests such disclosure.<sup>3</sup> The SEC's request may be "in an isolated context or in a broad context to cover a variety of situations and understood uses, as determined appropriate" by the SEC.<sup>4</sup>

On January 26, 2012, the SEC opted for the broad context approach, sending letters to FINRA<sup>5</sup> and the CEOs of SEC-registered FINRA-member broker-dealers<sup>6</sup> (together, SEC Letters) requesting that all such broker-dealers make available to FINRA SARs and supporting documentation, as well as any information that would reveal the existence of a SAR or any decision not to file a SAR (together, SAR Materials). The SAR Materials would need to be disclosed either in connection with a FINRA examination or investigation, or in connection with FINRA's risk assessment efforts within its examination program. The disclosure to FINRA is dependent on FINRA's taking "all appropriate steps to ensure that the SAR, or the existence of a SAR, is kept confidential throughout its

enforcement and investigatory processes."<sup>7</sup> Broker-dealers have been instructed that they may contact SEC staff should they have any concerns regarding FINRA's implementation of the SEC's request.<sup>8</sup>

FINRA has issued a Regulatory Notice informing members of the SEC Letters and noting FINRA's view that it "may request SARs and SAR information, or question firm staff, about SAR-related activity from any time frame within the examination or investigation review period, including any time prior to the SEC issuance of the letter."<sup>9</sup> The brief Regulatory Notice does not indicate how FINRA intends to implement its confidentiality obligations.

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<sup>1</sup> Department of Treasury Release, Financial Crimes Enforcement Network: Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75,593 at 75,597 (Dec. 3, 2010) ("Adopting Release").

<sup>2</sup>*Id.* at 75,594.

<sup>3</sup> The BSA regulations applicable to securities broker-dealers are at 31 C.F.R. 103.19. The Final Rule, at 31 C.F.R. 103.19(d) provides:

A broker-dealer shall make all supporting documentation available to FinCEN or any Federal, State, or local law enforcement agency, or any Federal regulatory authority that examines the broker-dealer for compliance with the Bank Secrecy Act, upon request; or to any SRO that examines the broker-dealer for compliance with the requirements of this section, upon the request of the Securities and Exchange Commission.

<sup>4</sup> Adopting Release, 75 Fed. Reg. at 75,597.

<sup>5</sup>Letter to Richard Ketchum, CEO of FINRA, Regarding an Amendment to 31 C.F.R. § 1023.320 , Confidentiality of Suspicious Activity Reports (Jan. 26, 2012), available at [www.sec.gov/about/offices/ocie/finraletter.htm](http://www.sec.gov/about/offices/ocie/finraletter.htm).

<sup>6</sup>Open Letter to CEOs of All SEC-Registered, FINRA Member Broker-Dealers Regarding an Amendment to 31 C.F.R. § 1023.320 , Confidentiality of Suspicious Activity Reports (Jan. 26, 2012), available at [www.sec.gov/about/offices/ocie/brokerdealerletter.htm](http://www.sec.gov/about/offices/ocie/brokerdealerletter.htm).

<sup>7</sup> SEC Letters.

<sup>8</sup>*Id.*

<sup>9</sup> FINRA Regulatory Notice 12-08, Anti-Money Laundering Program (February 2012).

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## *Authors*

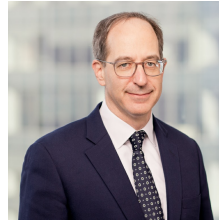


## Yoon-Young Lee

SENIOR COUNSEL

✉ [yoonyoung.lee@wilmerhale.com](mailto:yoonyoung.lee@wilmerhale.com)

☎ +1 202 663 6720



## Bruce H. Newman

PARTNER

✉ [bruce.newman@wilmerhale.com](mailto:bruce.newman@wilmerhale.com)

☎ +1 212 230 8835



## Franca Harris Gutierrez

PARTNER

Chair, Financial Institutions  
Practice

Co-Chair, Securities and  
Financial Regulation Practice

✉ [franca.gutierrez@wilmerhale.com](mailto:franca.gutierrez@wilmerhale.com)

☎ +1 202 663 6557